UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES
OF CALIFORNIA, INC., D/B/A/ BFI NEWBY
ISLAND RECYCLERY,

and

32-CA-160759
32-RC-109684

FPR-II, LLC, D/B/A LEADPOINT
BUSINESS SERVICES,

and

SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,

# RESPONSE TO TEAMSTERS LOCAL 350'S MOTION FOR RECONSIDERATION

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Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery ("BFI") submits the following response to Teamsters Local 350's ("Local 350" or "Union") Motion for Reconsideration. The Motion should be denied because it does not establish grounds for reconsideration under Board Rules and Regulations §102.48(c)(1).

## I. THE MOTION FAILS TO SPECIFY THE RECORD RELIED UPON THAT PURPORTEDLY MANDATES A JOINT EMPLOYER FINDING CONSISTENT WITH THE COURT'S OPINION

To the extent the Motion argues that the Board failed to find BFI exercised sufficient alleged indirect (or other) control over Leadpoint's employees, such an argument should be rejected because Local 350 did not "specify the page of the record relied upon" purportedly establishing such control. *Id.* *See* Motion *passim*. "As always, the burden of proving joint-employer status rests with the party asserting that relationship." *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599, 1616 (2015) (footnote omitted). The Motion does not identify specific facts not already raised before the Board which allegedly would mandate a joint employer finding within the boundaries recognized by the Court.

The Court held that indirect control does not include "those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor" and the other "quotidian aspects of common law third-party contract relationships." *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recycling v. NLRB*, 911 F.3d 1195, 1220 (D.C. Cir. 2018). Local 350 does not show how any indirect control evidence falls outside of those exclusions and should be considered relevant, much that dispositive control exists.

The only references in the Motion to alleged control facts appear without record citations at p. 9 n.2 (line speed) and p. 13. The Union describes the facts alleged on p. 13 as purported incidents of direct – not indirect – control. Notably, the Court did not enforce the Board's joint employer determination based upon the existence of sufficient direct control.

As for line speed, it does not constitute indirect control consistent with the Court's opinion. Leadpoint was engaged to perform services for a segment of BFI's integrated recycling operation. As the RD found, Decision and Direction of Election, p. 13, line speed is a function of volume coming into the facility, *i.e.*, a background condition. Moreover, any impact of line speed in the facility is not limited to only Leadpoint's employees.

Working on a volume-influenced line is part of the ground rules and expectations -- the "basic contours of contracted-for service" -- the Court found were irrelevant to joint employer analysis.[1] 911 F.3d at 1221. Indeed, if line speed somehow could be subject to collective bargaining; then, as BFI argued in its position statement on remand, pp. 26-27, it would violate the Act by governing employment terms of non-unit employees whose work also is affected.

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[1] *See also Southern California Gas Co.,* 302 NLRB 456, 461 (1991)("An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer employer is a joint employer of its contractor's employees.").

## II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER IS CONSISTENT WITH THE COURT'S REMAND

### A. The Board's Intertwined Common-Law Findings Were Held Unsound And Could Not Be Relied Upon On Remand

In remanding the case to the Board, the Court explained that it did so "[b]ecause we cannot tell from this record what facts proved dispositive in the Board's determination that Browning Ferris is a joint employer, and we are concerned that some of them veered beyond the orbit of the common law[.]" 911 F.3d at 1221.

As the Court found the Board's intertwined common-law findings to be unsound, it could not rely upon them on remand to determine what is dispositive. After evaluating the record and the parties' filings, the Board adopted the Regional Director's ("RD") identification of evidence relevant to an assessment of alleged common-law control. *Browning-Ferris Industries of California, Inc.*, 369 NLRB No. 139 at *4 (2020). The Board ultimately applied the pre-2015 joint employer standard to those facts for the reasons discussed below.[2]

The Union does not identify other control evidence not referenced by the RD that is relevant consistent with the Court's opinion – much less show that such other evidence warrants a different outcome.

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[2] Contrary to Local 350's argument, Motion pp. 1, 12-13, nowhere did the Board suggest that the Union "waived" its arguments concerning the RD's findings, or that the Board did not consider them. BFI and the Union both argued the facts in their position statements following remand, and throughout the case. *See, e.g., id.*, pp. 12-13. The Board simply indicated that in its 2015 decision, the majority did not contend that the RD's application of the pre-2015 joint employer standard to the evidence was inaccurate. 369 NLRB No. 139 at *4.

### B. The Court Did Not Dictate A Joint Employer Test To The Board

In assessing the law of the case, the Court did not purport to dictate a joint employer test to the Board. Nor did the Court: (1) require that the Board assign any particular or relative weight to indirect control evidence; or (2) determine that indirect (or reserved) control may be dispositive to a joint employer analysis. *See id.* at *2.

All the Court found is that indirect control evidence "can" be "relevant," while underscoring that "[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer." 911 F.3d at 1208.

The Board's pre-2015 joint employer standard considered indirect and reserved control to be "relevant" in supplementing and reinforcing substantial direct control evidence, but neither could be dispositive. *See, e.g.,* 369 NLRB No. 139 at *3.[3] Thus,

[3] *See also AM Property Holding Corp.*, 350 NLRB 998, 1002 (2007) ("We find that the contractual provision giving AM the right to approve PBS hires, standing alone, is insufficient to show the existence of a joint employer relationship. In assessing whether a joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties . . . [.]"); *J. P. Mascaro & Sons*, 313 NLRB 385, 389 (1993) enfd. sub nom. *NLRB v. Solid Waste Services, Inc.*, 38 F.3d 93 (2d Cir. 1994) ("Respondent of necessity may exercise some implicit or indirect control over the operations of [the subcontractor] at the facility to ensure against disruption of its own operations or to assure it secures the services promised, but this is no basis to find the customer-employer is a joint employer of its contractor's employees."); *Le Rendezvous Restaurant*, 332 NLRB 336 (2000) (considering evidence of contractually reserved authority in conjunction with user employer's exercise of direct and immediate control over hiring and discipline); *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1301–1302 (2000) (finding that the contract's broad grant of authority to the user employer over supervision and direction supported evidence of exercised direct control over supervision, direction, and discipline).

contrary to Local 350's argument, Motion pp. 2,14, the Board's prior test was not inconsistent with the common law. The common law is judicially developed, and the Union does not cite a single decision over its 30-year existence in which a court invalidated the Board's former joint employer standard as contrary to the common law.[4]

### C. The Board Reasonably Concluded That No Indirect Control Standard Consistent With The Court's Opinion Required A Joint Employer Finding

Here, "upon careful consideration" of the record and the parties' filings, the Board concluded that the Court's opinion did not compel it to impose any "clarified variant" of the 2015 joint employer standard in this case. *Id.* at *1.

Having evaluated the range of permissible formulations consistent with the common law, the Board concluded that any variant weighing indirect (or reserved) control factors above insufficient "relevance" -- as under the pre-2015 test -- would constitute a manifestly unjust "'substitution of new law for old law that was reasonably clear,' and on which employers may have relied in organizing their business relationships. *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (alteration in original; internal quotation marks omitted) (quoting *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996))." 911 F.3d at 1222. See *also* 369 NLRB No. 139 at *2 (same).

[4] Indeed, the core of what the Court described as relevant indirect control is circumstances which conceptually could be considered direct control. *See* 911 F.3d at 1219; Chairman Ring January 17, 2019 letter to Members of Congress, p. 4.

Nowhere in Local 350's Motion does it show the existence of -- much less the frequency and quantum -- of indirect (or other) control the Court indicated could suffice to establish a joint employer relationship. *See* 911 F.3d at 1219 ("If, for example, a company entered into a contract with Leadpoint under which that company made all of the decisions about work and working conditions, day in and day out, with Leadpoint supervisors reduced to ferrying orders from the company's supervisors to the workers, the Board could sensibly conclude that the company is a joint employer. This is especially so if that company retains the authority to step in and exercise direct authority any time the company's indirect mandates are not followed.") (emphasis supplied). The record does not remotely reflect that BFI "made all of the decisions about [Leadpoint's] work and working conditions, day in and day out."

### D. The Board's Decision To Not Apply The 2015 *Browning-Ferris* Standard Retroactively To BFI Is Sound

When BFI and Leadpoint organized their business relationship years prior to the Board's 2015 *Browning-Ferris* decision, as a matter of established Board law no amount of indirect control -- even if "relevant" -- was sufficient to establish joint employer status. Further, the Board was clear that substantial direct and immediate control was required. *See* 369 NLRB No. 139 at *3.

In contrast, in its 2015 decision, not only did the Board conclude that some quantum of indirect and/or reserved control alone could be dispositive in the absence of substantial direct and immediate control – a formulation the Court emphasized it did not address – but also that it was sufficient for control to be possessed rather than

actually exercised. *Browning-Ferris*, 362 NLRB at 1600. Additionally, the Board overruled (*id.* at 1614) prior decisions which excluded consideration of "limited and routine" control, *e.g.*, often precisely the "quotidian aspects of common law third-party contract relationships" that the Court found of no relevance in assessing joint employer status. *See* 911 F.3d at 1220. Those are fundamental, existential, categorical differences from what had been the settled law when BFI and Leadpoint entered into their service arrangement.

The Board on remand followed the Court in finding that the touchstone for eschewing retroactive application of a new rule is the substitution of "new law for old law that was reasonably clear." *Id.* at 1222 (citations omitted). Such plainly are the circumstances here.

As the Court further noted, the primary reason such a substitution is manifestly unjust is because of "reasonable, settled expectation." *Id.* (cited in Motion, p. 4). Contrary to Local 350's contention, Motion p. 6, the Board considered the universe of "reasonable, settled expectation."

The Union, of course, had none. It was seeking to overturn a 30-year joint employer doctrine that no court had refused to enforce as contrary to the common law. In the event, Local 350 could not even rely on the Board's 2015 common-law formulation which the Court then rejected.

Even if *arguendo* BFI and Leadpoint should have contemplated that indirect (or reserved) control could be "relevant" to their relationship, and even if the outcome of joint employer analysis often is fact dependent (Motion, pp. 6-8), there is a

conceptual chasm between the pre-2015 standard and the subsequent one. It makes all the difference if indirect (or reserved) control evidence is "relevant" in a supplementary capacity but insufficient and non-dispositive, or whether not only is the opposite true, dispositive control need not actually have been exercised, and even "limited and routine" control can be a factor.[5]

Likewise, there is no indication that the Board failed to consider the effects of retroactivity on the purposes of the Act. *Id.*, p. 9. Local 350 just disagrees with the Board's conclusion. The Union bootstraps that "if BFI is a common-law employer then, by definition, it exercises significant control over employees' terms and conditions of employment and bargaining will be benefitted by that employer's presence." *Id.* But nowhere in its Motion does the Union recite alleged "significant control" facts consistent with the Court's opinion mandating joint employer status here. As noted, the Court was unwilling to find joint employment based upon any alleged direct control evidence, and Local 350 does not identify indirect (or reserved) control -- as understood by the Court -- that would be dispositive.[6]

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[5] Local 350's other "reliance" arguments warrant little attention. The Union argues without support that protections against retroactivity are lessened in representation cases. *See* Motion, p. 8. The Union completely ignores the costs of being haled into an unanticipated bargaining relationship where a fundamental purpose of engaging a service provider is to rely upon their management.

[6] Further along those lines, as BFI argued in its position statement on remand (pp. 12, 23-24): (1) as the Board's bottom line inquiry in a representation case is whether the petitioned-for employees share a community of interest, as a matter of labor policy, the Board can give little if any recognition and weight to alleged control factors that are not equally applicable to all of the workers in a proposed bargaining unit; and (2) consistent with the text of Section 8(d), to be a joint employer under the Act, an entity must have sufficient control over, at least, "wages" and "hours," *i.e.*, must be capable of meaningful bargaining over those

As Local 350 indicates (*id.*, p. 10), one of the Board's policy reasons for abjuring retroactivity here is that the employees in question "cast their ballots on the assumption that a joint-employer relationship did not exist." 369 NLRB No. 139 at *4 (citing *H&W Motor Express*, 271 NLRB 466 (1984)). *H&W* stands for the unremarkable proposition that if employees vote for bargaining with a particular employer, it cannot be gainsaid from the result that they also desire bargaining with some other entity. Employee desires in such a situation cannot be presumed -- the vote simply does not authorize a different relationship.

The Union's argument (Motion, pp. 10-12) that its retroactivity determination here was inconsistent with its jurisprudence is equally meritless. The Board's adoption of a "contract coverage" standard to evaluate management rights in a labor agreement followed the District of Columbia Circuit's consistent application of such a test for close to 30 years. *See, e.g., NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). In contrast, as noted, Local 350 fails to identify any court decision in the pre-2015 test's 30-year history in which the Board's standard was invalidated. Moreover, unlike in the other retroactivity evaluations referenced by the Union, here there was comprehensive prospective rulemaking.

Accordingly, the Board reasonably concluded that subjecting BFI to a new joint employer standard would be manifestly unjust. The reliance interests assessed in a retroactivity analysis are those of the party against whom a new rule might be

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subjects "and" (not "or") other terms. There is no evidence that BFI has cognizable control over the wages and hours of Leadpoint employees.

applied, *i.e.*, BFI. Moreover, the Union has no reliance interests here. The pre-2015 rule and its weighting of common-law control factors were well established and settled. Departing from a requirement of substantial direct and immediate control in this case would constitute a fundamental change in the law. Further, imposing a bargaining requirement on BFI would be burdensome as the essence of a contractor arrangement is to obtain services from another entity instead of maintaining employment responsibilities. Such an outcome does not deprive employees of a bargaining relationship with Leadpoint.

### E. The Board's Approach To Retroactivity Is Reinforced By Its Rulemaking

The Board's approach to retroactivity here is reinforced by its rulemaking. Every Board decision has an adjudicative function for the parties. Some decisions also establish a policy standard. Alternatively, the Board can utilize rulemaking to implement policy. *See, e.g., NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (holding that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969) ("[S]o long as the matter involved can be dealt with in a way satisfying the definition of either 'rulemaking' or 'adjudication' under the Administrative Procedure Act, that Act, along with the Labor Relations Act, should be read as conferring upon the Board the authority to decide, within its informed discretion, whether to proceed by rulemaking or adjudication.").

Here, the Board completed extensive rulemaking to address joint employer policy. Its rulemaking supersedes and abandons the 2015 *Browning-Ferris* decision prospectively, while emphasizing that the resulting rules are consistent with the

Court's opinion in this case. In its rules, the Board assigned a weight to relevant indirect (and reserved) control evidence permitted by the opinion.[7]

To the extent the Court's remand encompassed the Board's policymaking function regarding the role of indirect control, the Board satisfied it by developing comprehensive rules. The Board duly "rearticulate[d] the parameters of the indirect control factor." Motion, p. 3. Having done so, it would make no sense to have a competing policy strand applicable only here and in a handful of other pre-rule matters.

That leaves the Board's adjudicative function and the limited needs of this case. Having had to discard the 2015 Board's flawed common-law findings, and after reviewing the record and filings, the Board reasonably concluded that no matter how indirect (or reserved) control are conceived of here consistent with the Court's opinion, it would be categorically and irreconcilably different from the Board's pre-2015 joint employer standard. As a result, and given the other considerations noted above, it would be manifestly unjust in this case to depart from such a previously well-settled test.

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[7] Contrary to the Union's argument, Motion, p. 5, n. 1, the Court's retroactivity discussion was premised on the notion that the Board conceivably could utilize adjudication instead of rulemaking to articulate a "new [joint employer] test[.]" 911 F.3d at 1222. At the time of the Court's opinion, the Board's joint employer rulemaking had not been finalized, and it was uncertain whether or when this might occur. Thereafter, the Board promulgated its comprehensive "new test" through prospective rulemaking.

Local 350's Motion for Reconsideration should be denied for the foregoing reasons.

Respectfully submitted,

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October 29, 2020

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 29, 2020 he caused a copy of the foregoing RESPONSE TO TEAMSTERS LOCAL 350'S MOTION FOR RECONSIDERATION in NLRB Cases 32-CA-160759 and 32-RC-109684 to be served by electronic mail and by United States first-class mail on the following case participants:

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